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2015 IL App (3d) 140402-U

Order filed September 11, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

DK SCHROCK YARD GRADING/LIGHT EXCAVATING, INC.,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellant,)	
v.)	Appeal No. 3-14-0402
)	Circuit No. 07-SC-4312
PEORIA BUILDERS, INC.,)	
Defendant-Appellee.)	Honorable Scott A. Shore, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice McDade and Justice Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly struck the plaintiff's claim for attorney's fees notwithstanding the defendant's payment of invoices which contained language purporting to require the defendant to pay attorney's fees, where payments merely discharged defendant's preexisting contractual obligations to pay for work already completed by the plaintiff.
- ¶ 2 The plaintiff, DKSchrock Grading / Light Excavating, Inc. (DKSchrock), obtained a money judgment against the defendant, Peoria Builders, Inc. (Peoria Builders), for unpaid

excavating and grading work it performed for Peoria Builders. DKSchrock appeals the trial court's order striking its claim for attorney's fees.

¶ 3 FACTS

¶ 4 DKSchrock entered into oral contracts with Peoria Builders to perform grading, excavating, leveling, dirt removal and other types of yard work on lots owned by Peoria Builders. Upon completion of the work, DKSchrock sent periodic invoices to Peoria Builders for the work it performed.

¶ 5 Each invoice that DKSchrock sent to Peoria Builders contained a box in the lower left-hand corner labeled "comments." The "comments" box in each invoice contained the following language:

"PLEASE PAY UPON REQUEST. (Amount with 10% interest if not paid by ____ is \$____).¹ *Legal/attorney's fees required to collect account balances will be incurred by the customer/undersigned per this agreement.*" (Emphasis added.)

¶ 6 Peoria Builders paid 25 of these invoices for work DKSchrock performed in 2007. However, when it refused to pay the final 9 invoices for that year, DKSchrock sued in the circuit court of Peoria County for payment of the unpaid invoices and for attorney's fees. The 9 invoices at issue were never returned by Peoria Builders to DKSchrock. DKSchrock attached copies of the 9 unpaid invoices to its second amended complaint. None of these invoices contained the signature of any agent of Peoria builders, either in the "comments" box or anywhere else on the invoices.

¹ Each invoice provided a payment due date and an amount that would be due (including interest) if Peoria Builders failed to pay the invoice by that date.

¶ 7 In support of its claim for attorney's fees, DKSchrock relied upon *Compass Environmental, Inc. v. Polu Kai Services, L.L.C.*, 379 Ill. App. 3d 549 (2008), in which our appellate court held that a subcontractor's course of conduct after receiving a written purchase order sent by a contractor indicated that the subcontractor had assented to the terms and conditions contained in the purchase order. Peoria Builders moved to strike DKSchrock's claim for attorney's fees. The trial court granted the motion. The court found *Compass Environmental* distinguishable, noting that "[t]here is a significant difference" between "a purchase order form that is intended to include [the] terms of a contract" and "an invoice."

¶ 8 DKSchrock subsequently filed a third amended complaint (complaint), again seeking the unpaid invoice amounts plus attorney's fees. DKSchrock attached the nine unpaid invoices at issue to its complaint. It also attached four additional invoices that DKSchrock sent to "Shea Property Management-Peoria Bldrs" in July, August, and September 2007 which were identical in form to the nine invoices at issue. Each of these four invoices contained handwritten notations, including the words "OK" and "Thanks!", and the name "Denny" (which was underlined). DKSchrock acknowledged that Peoria Builders paid these four invoices and it did not seek recovery for any amounts billed therein. However, DKSchrock attached the four invoices in support of its allegation that Shea Property Management (Peoria Builder's purported agent) "paid and signed off and initialed the agreement" regarding the payment of attorney's fees "with respect to jobs previous to" the ones at issue in this dispute. DKSchrock alleged that the attached invoices established a contract between the parties for the payment of interest plus the costs and attorney's fees that DKSchrock incurred in collecting the monies owed.

¶ 9 In its complaint, DKSchrock also alleged that Peoria Builders never complained about the work done or the rates charged by DKSchrock while the work was being performed or after it

was completed. It claimed that, to the contrary, "all discussions with [Brent] Reed [Peoria Builders' project manager] were either to pass on compliments about completed work or for more work than was previously requested. [*sic*]." DKSchrock claimed that Peoria Builders' refusal to pay the final nine invoices in 2007 was intentional and without justification. According to DKSchrock's complaint, Peoria Builders' refusal to pay was motivated not by any shortcoming on DKSchrock's work but by Peoria Builders' desire to negotiate discounts for work already performed by DKSchrock.

¶ 10 Moreover, DKSchrock alleged that Peoria Builders had paid several previous invoices and had never objected to terms of the invoices. Accordingly, DKSchrock maintained that Peoria Builders' prior course of conduct (including its payment of the four prior invoices allegedly "initialed" by an agent of Peoria Builders) demonstrated that the parties had contractually agreed to the terms stated in the invoices, including the provision regarding the payment of attorney's fees.

¶ 11 Peoria Builders again moved to strike DKSchrock's claim for attorney's fees. Once again, the trial court granted the motion. The trial court subsequently ruled in DKSchrock's favor on its claim for the amounts owed on the nine unpaid invoices. The parties entered into a stipulation and agreed order, and judgment was entered. This appeal followed.

¶ 12 ANALYSIS

¶ 13 DKSchrock argues that the trial court erred in striking its claim for attorney's fees. Peoria Builders' motion to strike did not state whether it was brought under section 2-615 or section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 5/2-619 (West 2010)) and the trial court did not specify which of those sections it relied upon in striking the claim. However, because Peoria Builders' motion challenged the legal sufficiency of DKSchrock's claim for

attorney's fees (and did not raise a defense or other affirmative matter that defeated the claim), it was, in substance, a motion to strike pursuant to section 2-615.² See *In re Estate of Powell*, 2014 IL 115997, ¶ 12. When ruling on such a motion, the court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. *Id*; see also *Doe v. Chicago Board of Education*, 213 Ill. 2d 19 (2004). A section 2–615 dismissal is proper where it is apparent the plaintiff cannot prove any set of facts entitling him to relief. *Dixon, Laukitis, and Downing, P.C. v. Busey Bank*, 2013 IL App (3d) 120832, ¶ 9. "The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted." *Estate of Powell*, 2014 IL 115997, ¶ 12; see also *Busey Bank*, 2013 IL App (3d) 120832, ¶ 9. We review an order granting or denying a section 2–615 motion to strike *de novo*. *Department of Healthcare and Family Services ex rel. Daniels v. Beamon*, 2012 IL App (1st) 110541, ¶ 15.

¶ 14 Under the "American rule," each party to a lawsuit is responsible for its own attorney's fees unless such fees are allowed by statute or contract. *Negro Nest LLC v. Mid-Northern Management, Inc.*, 362 Ill. App. 3d 640, 641-42 (2005). Based on the allegations and attachments contained in its complaint, DKSchrock argues that Peoria Builders' course of

² DKSchrock has not argued that Peoria Builders' motion to strike was insufficient because it did not specify whether it was brought under section 2–615 or section 2–619. Nor has DKSchrock argued that the motion should be treated as a 2-619 motion rather than a 2-615 motion.

Accordingly, any such arguments are forfeited. On appeal, neither party specifies which section of the Code governs the motion. However, both parties' arguments focus on the sufficiency of DKSchrock's allegations to state a cause of action for attorney's fees. Thus, we will treat Peoria Builders' motion as a section 2-615 motion to strike.

conduct shows that it contractually agreed to pay any attorney's fees that DKSchrock incurred in collecting unpaid invoices. Specifically, DKSchrock notes that: (1) language requiring Peoria Builders to pay such attorney fees "had been included on numerous invoices submitted and paid by [Peoria Builders] on prior jobs"; (2) Peoria Builders did not "inquire as to [these] terms, but continued contracting with DKSchrock"; (3) Peoria Builders paid these invoices without objection; and (4) the notations "OK" and "Denny" written on the four prior invoices attached to the complaint indicate that Peoria Builders' assented to the terms contained in those invoices, including the attorney's fee provision. Thus, DKSchrock maintains, the parties entered into a contract requiring Peoria Builders to pay DKSchrock's attorney fees.

¶ 15 We do not find these arguments persuasive. "[F]or course of conduct to act as consent to a contract, it must be clear that the conduct relates to the specific contract in question." *Compass Environmental*, 379 Ill. App. 3d at 554 (quoting *landmark Properties, Inc. v. Architects International-Chicago*, 172 Ill. App. 3d 379, 383 (1988)). Here, Peoria Builder's payment of invoices reflecting work already completed by DKSchrock did not clearly relate to any agreement to pay attorney's fees. Nor did it indicate Peoria Builder's assent to the attorney's fee provision written on the invoices. Rather, such payments merely discharged Peoria Builder's preexisting obligation to pay for services already rendered by DKSchrock. If Peoria Builder's had paid any *attorney's fees* sought by DKSchrock after receiving the invoices in question, such conduct could indicate Peoria Builders' assent to the attorney's fees provision (*i.e.*, it could serve as evidence of a contract to pay attorney's fees). *See, e.g., Occidental Chemical Co. v. Agri Profit Systems, Inc.*, 37 Ill. App. 3d 599, 602 (1976) (fact that buyer paid monthly finance charges as reflected on written billing statements from seller showed that the parties had agreed that finance charges would be assessed on a monthly basis). However, Peoria Builders' payment of invoices

for work already completed by DKSchrock merely constitutes Peoria Builders' performance of its obligations under the oral service contracts it had previously entered into with DKSchrock.³

¶ 16 In support of its argument, DKSchrock relies upon our appellate court's decisions in *Compass Environmental*, 379 Ill. App. 3d at 554, and *Occidental Chemical*, 37 Ill. App. 3d at 602. Both cases are distinguishable. In *Compass Environmental*, the defendant subcontractor orally agreed to perform roofing work for the plaintiff. Four days after the defendant began work, it received a written purchase order from the plaintiff which included several terms and conditions, including a forum selection clause in the event of a dispute between the parties. When it received the electronic version of the plaintiff's purchase order, the defendant did not inquire about any of the terms of conditions contained in the purchase order; rather, it continued working without objection. After the finding the contract terms between the parties to be ambiguous, our appellate court looked to the conduct of the parties to construe the contract's terms. Our appellate court held that, by its course of conduct, the defendant had assented to the terms and conditions on the purchase order, including the forum selection clause. *Id.* The key to

³ Peoria Builders claims that at least some of the handwritten notations on the four prior invoices attached to DKSchrock's complaint (including the words "Thanks," and "Denny") were written by Denny Schrock, DKSchrock's president, and not by any agent of Peoria Builders. However, in reviewing the dismissal of DKSchrock's claim for attorney fees under section 2-615, we must assume the truth of DKSchrock's factual allegations, including its allegation that these notations were written by an agent of Peoria Builders. See *Oliva v. Amtech Reliable Elevator Co.*, 366 Ill. App. 3d 148, 151 (2006). Regardless, the existence of these handwritten notations on prior invoices does not constitute a course of conduct demonstrating Peoria Builder's assent to the attorney's fee provision.

our appellate court's holding in *Compass Environmental* was that the defendant continued to work without objection after it received the written contract that purported to memorialize the terms of the parties' service contract and before it had completed its performance under that contract. In this case, by contrast, DKSchrock merely paid for jobs already completed by DKSchrock. Peoria Builders' payment for services already rendered by DKSchrock does not demonstrate its assent to any additional written terms contained in the invoices billed for such work.

¶ 17 For similar reasons, *Occidental Chemical* does not support DKSchrock's position. In *Occidental Chemical*, 37 Ill. App. 3d at 600-01, the parties entered into a written contract appointing the defendant as a dealer authorized to sell the plaintiff's agricultural chemicals, materials, and supplies. The contract provided that the defendant would be charged a service charge of 1% on all past due balances, but it did not specify whether this 1% charge would be assessed monthly or annually. After finding the contract ambiguous, our appellate court looked to extrinsic evidence to construe this ambiguous contract term, including the parties' course of conduct after entering into the contract. *Id.* at 602. The court noted that the plaintiff sent the defendant billing statements which reflected a monthly service charge of 1%, and the defendant paid these charges without objection. The court therefore concluded that "[i]t is clear from the acts of the parties that they understood the stated percentage to be a monthly rate." Here, by contrast, Peoria Builders merely paid amounts due for work completed by DKSchrock. It did not pay any attorney's fees claimed by DKSchrock or perform any other act suggesting that it agreed to pay such fees.

¶ 18 Accordingly, DKSchrock's allegations were insufficient to state a claim for attorney's fees, and we affirm the trial court's decision to strike that claim.

¶ 19 Finally, Peoria Builders asks that we impose sanctions upon DKSchrock under Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)), arguing that DKSchrock's claim for attorney's fees is legally baseless and is not supported by any good faith argument for the extension or modification of existing law. However, Peoria Builders never moved for sanctions before the trial court and never argued that DKSchrock's complaint (or any other pleading that DKSchrock filed before the trial court) violated Rule 137. Accordingly, any such argument is forfeited on appeal. *Peal v. Lee*, 403 Ill. App. 3d 197, 211 (2010) ("Arguments made for the first time on appeal are deemed forfeited [citation], including requests for Rule 137 sanctions [citation]"). To the extent that Peoria Builders is arguing that DKSchrock should be sanctioned because its *appeal* is frivolous, it should have moved for sanctions under Supreme Court Rule 375(b) (Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994)), not Rule 137. Regardless, we decline to impose sanctions because we do not find DKSchrock's appeal to be frivolous, patently without merit, or brought in bad faith or for an improper purpose. See Ill. S. Ct. 375(b) (eff. Feb. 1, 1994).

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Peoria is affirmed.

¶ 22 Affirmed.